THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0047, Sally K. Bonnvie & a. v. Beaulieu-Lindquist Real Estate, Inc., the court on March 13, 2007, issued the following order:

The plaintiffs, Sally K. and William Bonnvie, appeal a court order denying them leave to substitute DEAL, LLC for the defendant, Beaulieu-Lindquist Real Estate, Inc., and granting the defendant's motion for summary judgment. We vacate and remand.

The plaintiffs argue that the court erred when it denied their motion to amend the writ to substitute the party defendant. "The decision of the trial court to deny a motion to amend will not be overturned absent an unsustainable exercise of discretion." Thomas v. Telegraph Publ'g Co., 151 N.H. 435, 439 (2004). Generally, a court should allow amendments to pleadings to correct technical defects. Id. Under RSA 514:9 (1997), however, a court need only allow substantive amendments when necessary to prevent injustice, upon such terms as the court deems just and reasonable, provided that the rights of third parties are not affected thereby. See id. A substantive amendment that introduces an entirely new cause of action, or calls for substantially different evidence may be denied. Id.

We have on two prior occasions addressed whether a plaintiff should be permitted to amend a pleading to substitute a defendant after the applicable statute of limitations has expired. In Lewis v. Hines, 81 N.H. 24 (1923), we upheld the trial court's denial of the plaintiff's motion to amend by joining the Boston & Maine railroad as a defendant. In that case, in 1919, two writs were brought against "Walker D. Hines, Director General of the Railroads, representing the Boston & Maine Railroad, doing business in Nashua, in said county." Hines, 81 N.H. at 24 (quotation omitted). The writs were served upon a ticket master in Nashua. Id. at 24-25. Hines moved to dismiss the writs on the ground that, in 1917, when the accident upon which they were based occurred, he was not the "Director General of the Railroads" and the federal government had not yet taken over the administration of railroads. Id. at 24 (quotation omitted). Hines' motions to dismiss were granted. Id. at 25. In 1922, the plaintiffs sought to amend their writs by adding after the defendant's place of business, "also the Boston & Maine Railroad Corporation, duly established and doing business in said Nashua." Id. (quotation omitted). The trial court denied the motion to amend. Id.

In affirming, we noted that when a new defendant is added by an amendment, the amendment does not relate back to the original filing of the lawsuit. See id. at 26. The lawsuit, thus, was untimely with respect to the Boston & Maine railroad. Id. Therefore, we ruled, "the court made the only sustainable ruling. It could not be found that justice required so useless a proceeding as giving permission to a plaintiff to initiate a suit which must at once be dismissed." Id.

We rejected the plaintiffs' argument that the amendment should relate back to the original filing of the lawsuit because the amendment merely specified the original defendant with more particularity. Id. at 26-27. To the contrary, the original writ contained no evidence of any intent to sue the railroad and the mistake did not relate to an imperfect description of the railroad as a defendant. Id. at 27.

We also rejected the plaintiffs' assertion that service of the writ on the ticket agent in Nashua was service on a servant of the railroad and thus notified the railroad of the suit. Id. We ruled that the ticket agent was a federal employee and no longer represented the Boston & Maine railroad. Id.

By contrast, in Dupuis v. Smith Properties, Inc., 114 N.H. 625 (1974), we reversed the trial court's denial of the plaintiff's motion to substitute the name of the intended defendant after the expiration of the statute of limitations. In that case, the plaintiff sued "Smith Properties, Inc. d/b/a R. H. Sm[i]th Company." Dupuis, 114 N.H. at 627. The plaintiff so described the defendant because of information supplied to him by the secretary of state concerning the user of the name "R.H. Smith Company." Id. The intended defendant was "Ralph H. Smith Corporation," which had registered the name "R.H. Smith Company." Id. Both "Smith Properties" and "Ralph H. Smith Corporation" had the same agent for service of process. Id. After the expiration of the statute of limitations, the plaintiff moved to amend his declaration and writ to reflect the correct corporate name of the defendant. Id. The trial court denied these motions. Id.

In reversing, we explained that regardless of whether the plaintiff's mistake was misnomer or mistaken identity, the "crucial fact" was whether the intended defendant received actual notice before the statute of limitations expired. Id. at 629. We observed that under RSA 514:9, the "plaintiff should have been permitted to amend . . . since [the] defendant would not be prejudiced by the amendment." Id. Because the intended defendant had timely actual knowledge that the plaintiff's action was really directed against it, we ruled that the court erred when it denied the plaintiff's motion. Id. at 629-30. As we explained: "The rationale for the statute of limitations which is to ensure that defendants receive timely notice of actions against them, is not applicable in a case such as this one where the defendant actually received notice within the limitation period." Id. at 629. Under these circumstances, also, there was potential injustice and

prejudice to the plaintiff. Id. at 628. If the plaintiff was not permitted to amend, "an entirely new cause of action against the intended corporate defendant [would] be barred by the statute of limitations." Id.

We most recently discussed the issue in Perez v. Pike Industries, 153 N.H. 158 (2005). In Pike, however, we were not asked to decide whether the trial court erred when it granted the plaintiff's motion to add Pike as a party defendant. The issue in Pike, rather, was whether the trial court erred when it dismissed the plaintiff's claim against Pike because it was time-barred. Pike, 153 N.H. at 159-60. On appeal, the plaintiff argued, among other things, that his initial writ named Pike as a party by referring to the "agents, servants and employees of the State." Id. at 160 (quotation omitted). We rejected this assertion, observing that this reference was too generalized to have put Pike on notice of the plaintiff's claim. Id. at 163. Moreover, we disagreed with the plaintiff that his case was similar to Dupuis, noting that whereas in Dupuis, the intended defendant received actual notice of the suit before the statute of limitations expired, Pike did not receive actual notice of the plaintiff's suit before the statute of limitations expired. Id. at 162-63. Absent actual notice, we opined, permitting the plaintiff to substitute Pike for the party defendant after the statute of limitations expired, would prejudice Pike. Id. at 163.

The crucial issue, therefore, is whether DEAL, LLC had actual notice of the plaintiffs' lawsuit. The plaintiffs assert that because Al Lindquist received actual notice of the lawsuit and because he is one of two members of DEAL, LLC, DEAL, LLC itself received actual notice of the lawsuit. The defendant counters that because the registered agent for service of process for DEAL, LLC was never served with the lawsuit, DEAL, LLC never had actual notice of it.

Service of process, however, is not required to find actual notice. See Dupuis, 114 N.H. at 630. In Dupuis, we observed that the notice the defendant received was informal but that "[i]nformality will not nullify the notice so long as defendant receives actual knowledge." Id. The actual notice to which we referred in Dupuis was not service of the writ but information the owner of the intended corporate defendant received from his office manager regarding the accident, which occurred before he purchased the company, and the writ's allegations when it was first filed. Id. at 627.

Moreover, the defendant's argument does not address the plaintiffs' assertion that where one member of a limited liability company has actual notice of a lawsuit, that notice may be imputed to the limited liability company itself.

The trial court did not address the plaintiffs' assertion either, and we decline to do so in the first instance. We therefore vacate the trial court's order and remand for the trial court to consider whether, where one member of a

limited liability company has actual notice of a lawsuit, notice may be imputed to the company itself.

Vacated and remanded.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

Eileen Fox,
Clerk